

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MITCHELL RACKER	:	DETERMINATION
		DTA NO. 818399
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1995 through November 30, 1996.	:	

Petitioner, Mitchell Racker, 2360 National Drive, Brooklyn, New York 11234, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1995 through November 30, 1996.

On June 13, 2001, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel) filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the grounds that petitioner failed to file a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination to petitioner. The Division of Taxation submitted a Notice of Motion and the affidavit of Michael P. McKinley, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley in support of its motion. Petitioner, appearing by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel) filed a response to the motion on July 9, 2001, which date commenced the 90-day period for the issuance of this determination. Based on the motion papers, the affidavits and documents

submitted therewith, the response by petitioner and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of the Notice of Determination to petitioner.

FINDINGS OF FACT

1. As a result of a sales and use tax audit of Parkset Supply Ltd's ("Parkset") records, the Division of Taxation (the "Division") issued a Statement of Proposed Audit Adjustment ("Statement"), dated April 9, 1998, to Parkset asserting sales and use taxes due for the period September 1, 1993 through November 30, 1996 of \$16,011.36, plus interest, for a total amount due of \$20,747.17.

2. On April 20, 1998, Parkset, by its authorized representative, Isaac Sternheim, executed a consent, which appears on the Statement, that finally and irrevocably fixed the sales and use tax due in the amount of \$16,011.36, plus interest.

3. The Division issued to Mitchell Racker, a Notice of Determination dated November 2, 1998 which was addressed to petitioner at "2360 NATIONAL DR, BROOKLYN, NY 11234-6835." The notice bears assessment identification number L-015753335-3 and at the top of the notice is certified control number P 911 005 307. The notice assessed a total amount of \$7,517.36, which consisted of tax due in the amount of \$6,170.67, plus interest of \$1,346.69 for the period September 1, 1995 through November 30, 1996. The notice was issued to petitioner

as an officer and person responsible to collect and remit sales and use taxes on behalf of Parkset pursuant to Tax Law § 1138(a); § 1131(1) and § 1133(a).

The instructions on the notice stated, among other things, “**If we do not receive a response to this notice by 01/31/99:** This notice will become an assessment subject to collection action.”¹ (Emphasis in original.)

4. Petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Determination L-015753335-3. The request form signed by petitioner’s representative, Bernard S. Mark, is dated January 29, 2001. The envelope in which the request form was mailed by certified mail² bears a stamp indicating receipt by BCMS on February 2, 2001. On the request form, petitioner’s address is listed as 2360 National Dr., Brooklyn, New York 11234-6835.

The following was set forth in the request as the basis for the disagreement with the Notice of Determination: “Parkset properly filed and paid all sales taxes for the periods indicated. In any event, Mitchell Racker was not a responsible person during those periods.”

5. On February 16, 2001, BCMS issued a Conciliation Order Dismissing Request (CMS No. 18434) to petitioner. The order states, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on November 2, 1998, but the request was not received until February 2, 2001, or in excess of 90 days, the request is late filed.

¹ January 31, 1999 is the due date for a request for conciliation conference or petition as listed on the notice of determination. However, since January 31, 1999 was a Sunday, the petition or request for a conciliation conference was required to be filed by Monday, February 1, 1999 (*see*, Tax Law § 1147[a][3]; General Construction Law §§ 20, 25-a; *Matter of American Express Co.*, Tax Appeals Tribunal, July 3, 1991).

² A United States Postal Service (“USPS”) postmark is not visible on the photocopy of the envelope included in the record.

6. On March 19, 2001, petitioner filed a petition with the Division of Tax Appeals seeking a revision of the determination issued in this matter. In that petition, petitioner asserts that the tax was fully paid, even if delinquent. In support of that assertion, exhibits attached to the petition include, among others, copies of seven canceled checks drawn on Parkset's checking account, each of which is payable to "N.Y.S. Sales Tax Central Returns Pro. Ctr." and bears a date in 1998, the sum of which total \$20,747.17.

7. Notices of determination, such as the one at issue herein, are computer-generated by the Division's Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

8. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "CERTIFIED NO." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The printing date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR lists a printing date of "10/24/98," which has been manually changed to "11/2/98."

9. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee affixes a postmark and initials or signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

10. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

11. The CMR relevant to this matter is a 25-page, fan-folded (connected) computer-generated document entitled "ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." This CMR lists consecutive certified control numbers P 911 005 182 through P 911 005 448. Each page contains 11 entries, with the exception of the last page (page 25) which contains 3 entries. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 25 pages of the CMR.

Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.³

12. The information concerning the Notice of Determination issued to petitioner is contained on page 12 of the CMR. Review of page 12 of the CMR indicates that a Notice of Determination, with notice number L 015753335, was sent to “RACKER-MITCHELL, 2360 NATIONAL DR, BROOKLYN, NY 11234-6835,” by certified mail using control number P 911 005 307.

13. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated November 2, 1998.

14. The last page of the CMR, page 25, contains a pre-printed entry of 267 corresponding to the heading “TOTAL PIECES AND AMOUNTS LISTED.” This pre-printed entry has been manually circled and beneath it is the illegible signature or initials of a Postal Service representative.

15. The affixation of the Postal Service postmark, the signature or initials of the Postal Service representative appearing on the last page of the CMR and the circling of the “267” indicate that all 267 pieces listed on the CMR were received at the post office.

16. In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

17. The facts set forth above in Findings of Fact “7” through “10” and “15” through

³ The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

“16” were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of determination. Mr. Baisley is employed as the Chief Mail Processing Clerk in the Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

18. Attached to the Division’s motion papers was a copy of the first two pages of Mitchell and Phyllis Racker’s joint 1997 resident income tax return (form IT-201) which indicates that their address was 2360 National Drive, Brooklyn, NY 11234. This return was signed by petitioner and his spouse on April 30, 1998.

19. Petitioner’s response to the Division’s motion consists of the affidavit of Bernard S, Mark, which affidavit references the petition filed in this matter and attachments thereto.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party’s favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of

any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also, Matter of Service Merchandise Co., Inc.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Tax Law § 1138(a)(1)⁴ provides, in pertinent part, that:

⁴ Section 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (*see, McKinney’s Cons Law of NY*, Book 1, Statutes § 51[b]). Since the assessment in this case pertains to the time period September 1, 1995 through November 30, 1996, the amendment to Tax Law § 1138(a)(1) does not apply.

[n]otice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing. . . .

As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. The time period for filing such request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (*Id.*) In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner's last known address.

D. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and second, there must

be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and James Baisley (Chief Mail Processing Clerk in the Division's Mail Processing Center) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination (*see, Matter of Roland, supra*). The affidavits show that, as each notice is generated, a certified control number is assigned to it. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

The Division established that the general issuance procedure was followed on November 2, 1998 in the generation and mailing of petitioner's Notice of Determination. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmark on the CMR, in turn, shows the date of mailing as November 2, 1998 (*see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995*). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purpose of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

Finally, it is noted that the figure "267" on the last page of the November 2, 1998 CMR, signifying the total number of pieces of mail involved, has been circled and the illegible signature or initials of a Postal Service representative appears directly beneath the circled figures. As in

Matter of Roland (supra), the postal employee circled this figure to indicate the number of pieces of mail received by the USPS on November 2, 1998. In addition, and unlike the situation in ***Roland***, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in ***Roland***. Accordingly, consistent with the reasoning in ***Roland***, the Division has established that the Notice of Determination was mailed on November 2, 1998.

E. Where it has been found that the Notice of Determination was properly addressed to petitioner's last known address, the presumption of receipt arises when the Division demonstrates that it has a routine office practice and procedure for mailing the notice and that the notice was in fact properly addressed and mailed (***Matter of T.J. Gulf, Inc. v. State Tax Commn.***, 124 AD2d 314, 508 NYS2d 97). In the instant matter, the Division has presented sufficient evidence to establish that it mailed a Notice of Determination to petitioner at his last known address on November 2, 1998. The taxpayer has the right to rebut the presumption, but rebuttal must consist of more than a mere denial of receipt (*id.*; ***Matter of American Cars-R-US, Inc. v. State Tax Commn.***, 147 AD2d 795, 537 NYS2d 672). In the instant matter, petitioner's response to the Division's motion for summary determination consists of his representative's affidavit. In his affidavit, Mr. Mark states that "petitioner advises that he has no recollection of actually receiving the Notice of Determination" at issue in this matter. Mr. Mark avers that he was supplied with a copy of the Notice by petitioner's former representative. Petitioner failed to submit any evidence to rebut the presumption of receipt other than a general denial made on his behalf in Mr. Mark's affidavit submitted in response to the Division's motion for summary

determination. Since petitioner's representative, Mr. Mark, has no personal knowledge concerning the receipt of the subject Notice of Determination, his affidavit is probatively valueless and without evidentiary significance (*see, Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595, 598; *Jabs v. Jabs*, 221 AD2d 704, 633 NYS2d 616, 617; *see also, Matter of Roland, supra*). Petitioner has failed to carry his burden of proving nonreceipt of the subject Notice of Determination.

Accordingly, petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of November 2, 1998, or no later than February 1, 1999. Since the request was not made until February 2, 2001, it is time barred. Mr. Mark's affidavit also contains certain allegations relating to the merits of the petition. With respect to such allegations, absent a timely filed petition, the Division of Tax Appeals has no jurisdiction to consider the merits of petitioner's claim (*see, Matter of Halperin v. Chu*, 134 Misc 2d 105, 509 NYS2d 692, 694, *affd* 138 AD2d 915, 526 NYS2d 660, 661-662, *lv denied, appeal dismissed* 72 NY2d 938, 532 NYS2d 845).

F. The only issue of fact raised was the nonreceipt of the Notice of Determination by petitioner. Since the Division has sufficiently refuted such nonreceipt by its proof, and petitioner has submitted nothing further, the issue is found to be irrelevant as a matter of law. Such result leaves this matter a proper one for summary determination.

G. The Division of Taxation's motion for summary determination is granted and the petition of Mitchell Racker is hereby dismissed.

DATED: Troy, New York
October 4, 2001

/s/ Winifred M. Maloney_____
ADMINISTRATIVE LAW JUDGE